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No. 90-516

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JILL S. KAMEN,

Petitioner,

v.

KEMPER FINANCIAL SERVICES, INC. and
CASH EQUIVALENT FUND, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT KEMPER FINANCIAL SERVICES, INC.

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the court of appeals' reasoning that the futility exception to the demand requirement should not apply to shareholder derivative actions under Section 20(a) of the Investment Company Act of 1940, where (a) the facts of this case, as found by the district court and accepted by the court of appeals, showed that the plaintiff had not established futility as a matter of fact, and (b) no other court of appeals has expressly addressed the merits of the reasoning adopted by the court of appeals in this case, so that no direct, clear or settled conflict among the circuits exists at this time.

2. Whether certiorari should be granted to review the court of appeals' holding that no right to jury trial exists with respect to claims under Section 36(b) of the Investment Company Act of 1940, where that holding is consistent with the holding of every court of appeals and district court to have considered the issue.

RULE 29.1 LISTING

The following are parent corporations and subsidiaries (not wholly owned) of Kemper Financial Services, Inc.:

Parent Corporations:

Kemper Financial Companies, Inc.
Kemper Corporation
Lumbermens Mutual Casualty Company

Subsidiaries Not Wholly Owned:

Dimensional Fund Advisers, Inc.
Investors Fiduciary Trust Company
Kemper International Management, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 908 F.2d 1338 (1990). The opinion of the United States District Court for the Northern District of Illinois is reported at 659 F. Supp. 1153 (1987).

STATEMENT OF THE CASE

1. District Court Proceedings

Petitioner Jill S. Kamen, plaintiff below ("plaintiff"), is a shareholder in Cash Equivalent Fund, Inc. (the "Fund"), a money market mutual fund that is registered as an investment company under the Investment Company Act of

1940 ("the Act"). Respondent Kemper Financial Services, Inc. ("KFS") is the investment adviser and underwriter of the Fund.

On May 10, 1985, plaintiff filed a one-count shareholder's derivative action, asserting claims against KFS and the Fund under Sections 20(a) and 36(b) of the Act, 15 U.S.C. §§ 80a-20(a), 80a-35(b).[1] The complaint alleged that KFS had violated the proxy provisions of Section 20(a) and breached its fiduciary duty under Section 36(b) by charging excessive investment advisory fees. (Pet. App. 89a-93a.) The purported proxy violation is based on one sentence in a proxy statement to shareholders seeking continued approval of the fees charged by KFS. Plaintiff contends that the statement was misleading because it did not specify the precise structure of fees charged by KFS to Kemper Money Market Fund ("KMMF") and thereby implied that the fees charged to the Fund were lower than the fees charged to KMMF. (Pet. App. 90a-91a.) The excessive fees claim is premised largely on the assertion that the fees charged to the Fund were disproportionate to the services rendered by KFS and greater than those charged to KMMF. (Pet. App. 89a-92a.) The relief sought was disgorgement and return to the Fund of fees found to be excessive. Plaintiff demanded a trial by jury. (Pet. App. 85a.)

KFS moved to dismiss plaintiff's Section 20(a) proxy violation claim and to strike the jury demand on the Section 36(b) claim. On February 2, 1987, the district court issued a memorandum opinion and order which dismissed the Section 20(a) claim and struck the jury demand. (Pet. App. 33a-60a.)

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[1] Plaintiff filed three successive complaints, the allegations of which were substantially the same. For purposes of simplicity, we will refer only to the Supplemental Amended Complaint filed on December 8, 1986. (Pet. App. 85a-95a.)

With regard to the Section 20(a) proxy violation claim, the district court held that plaintiff's generalized allegations did not satisfy the Rule 23.1 requirement that a complaint must allege the efforts made "to obtain the action the plaintiff desires from the directors . . . and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Fed. R. Civ. P. 23.1. Specifically, the court found that, apart from conclusory, non-factual assertions, plaintiff's claim that a demand would be futile essentially rested on two allegations: (1) that the directors received substantial remuneration for their services, and (2) that the directors assisted KFS in soliciting the shareholders with the allegedly misleading proxy statement. Following relevant precedent, the district court concluded that Rule 23.1 would be seriously diluted and rendered ineffective if plaintiff's allegations were considered sufficient to excuse a demand. (Pet. App. 53a-54a.)

The district court also held that the plaintiff's jury demand on the Section 36(b) claim should be stricken because Section 36(b) creates an equitable cause of action. Plaintiff seeks restitution of allegedly excessive fees, a claim that is equitable in nature.

After reviewing prior judicial decisions and the legislative history of Section 36(b), the district court followed unanimous decisional law and held that "since [Section] 36(b) involves a claim for breach of fiduciary duty and limits damages to restitution of excessive fees, the action is essentially in equity and therefore not covered by the Seventh Amendment." (Pet. App. 58a.) Plaintiff argued that her claim was an action at law, which entitled her to a jury trial, simply because she requested "damages" in her complaint. The district court rejected that argument, however, stating that "[t]he semantics of Kamen's complaint cannot reign over the substance of her Section 36(b) claim, which is an action seeking restitution for excessive fees paid

to KFS." (Pet. App. 59a, n.19.) Plaintiff filed a motion for reconsideration, which was denied. (Pet. App. 61a-65a.)

Thereafter, plaintiff filed a petition for a writ of mandamus with respect to the striking of the jury demand. The Seventh Circuit denied the petition for mandamus, and this Court denied certiorari. (Pet. App. 69a, 71a.)

KFS subsequently moved for summary judgment on the Section 36(b) claim on the ground that plaintiff was not an adequate representative of the investors in the Fund. The district court dismissed the Section 36(b) claim on that ground.[2]

2. Seventh Circuit Proceedings

On appeal, plaintiff argued that the judgment should be reversed. The Seventh Circuit held that plaintiff's Section 20(a) proxy violation claim was properly dismissed for failure to make a demand. The Seventh Circuit observed that the trial court "thought [plaintiff's] allegations insufficient to excuse a demand under Rule 23.1, as do we." (Pet. App. 6a.) Without questioning the district court's factual finding, the Seventh Circuit went on to hold that the futility exception to the demand requirement should be eliminated, as a matter of federal common law. In a lengthy opinion, the court found that no Supreme Court precedent barred such a result, the desirability of which was underscored further by the fact that several other circuits had "display[ed] impatience with the futility exception." (Pet. App. 18a.) The Seventh Circuit concluded that " '[f]utility' is the only reason Kamen gives for not making a demand on her claim under [Section] 20(a). As this is an unsatisfactory reason, we agree with the district court's decision that the claim must be dismissed for failure to make a required demand." (Pet. App. 20a.)

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[2] Contemporaneously with the filing of this brief in opposition, KFS has filed a conditional cross-petition in which it seeks review with respect to the sole issue on which the court of appeals ruled against it, that is, the question whether plaintiff was an adequate representative.

The Seventh Circuit also affirmed the district court's holding that plaintiff was not entitled to a jury trial on her Section 36(b) claim. The Seventh Circuit followed unanimous authority in other federal courts and adopted "both the holding and the rationale of [*In re*] *Evangelist* [,760 F.2d 27 (1st. Cir. 1985)]." (Pet. App. 30a.) The Seventh Circuit also carefully analyzed this Court's recent decision in *Teamsters, Local No. 391* v. *Terry,* 110 S. Ct. 1339 (1990), and concluded that application of the two-pronged test set forth in that case further confirmed the absence of any constitutional right to a jury trial in a Section 36(b) action.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION, DISMISSING PLAINTIFF'S DERIVATIVE ACTION UNDER SECTION 20(a) FOR FAILURE TO MAKE A DEMAND, IS CORRECT, DOES NOT CONFLICT WITH ANY PRIOR HOLDING OF THIS OR ANY OTHER COURT, AND DOES NOT WARRANT REVIEW.

A. This Case Is Not An Appropriate Vehicle For Supreme Court Review Because The Question Plaintiff Seeks To Present Is Purely Academic In The Circumstances Of This Case.

Plaintiff contends that the Seventh Circuit's decision conflicts with previous decisions of this Court and of the other courts of appeals. As we show below (*see* pages 9-13, *infra*), no such conflict exists. This case does not warrant this Court's review in any event because resolution of the purported conflict will not affect the outcome of this case. Whatever the Court might rule with respect to the Seventh Circuit's reasoning that the futility exception should be eliminated, the outcome of this case would remain unchanged because the district court properly found, on the facts of this case, that plaintiff had not established the factual elements

necessary to invoke the futility exception. The court of appeals did not question the correctness of that factual finding. Thus, the question which plaintiff seeks to present is purely academic and does not warrant further review at this time.

Plaintiff conceded below that Rule 23.1, which governs derivative actions, applies to a cause of action under Section 20(a). (Pet. App. 7a.) Rule 23.1 requires a shareholder to allege the efforts made to obtain action by the board of directors and the "reasons for the plaintiff's failure to obtain the action or for not making the effort." Fed. R. Civ. P. 23.1. Plaintiff acknowledges that she failed to make a demand on the Fund's Board of Directors. Thus, the question most immediately confronting the district court was whether plaintiff's factual allegations were sufficient to excuse her failure to make the required demand.

More specifically, the district court was required to test the sufficiency of plaintiff's assertions that demand would have been futile because (1) the directors received remuneration for their services, and (2) they approved the challenged conduct. (Pet. App. 52a-54a.) The district court found that these factual assertions were insufficient under Rule 23.1.

With regard to plaintiff's allegation concerning the directors' remuneration, the district court found that:

> The mere fact that the directors receive substantial remuneration for acting as directors does not, in and of itself, establish that they could not impartially review the merits of Kamen's excessive fee claim. If the fact that a director is paid for his services was sufficient to avoid Rule 23.1, Rule 23.1 would be rendered ineffective.

(Pet. App. 52a-53a.)

Likewise, the district court found that approval of the challenged conduct was not itself sufficient to show that a demand would be futile:

> The courts have consistently held that "mere approval of challenged conduct is insufficient to render the demand futile." *Lewis* v. *Anselmi*, 564 F. Supp. 768, 772 (S.D.N.Y. 1983); *Atkins* v. *Tony Lama Co.*, 624 F.Supp. 250, 255 (S.D. Ind. 1985); *Lewis* v. *Valley*, 476 F.Supp. 62, 64 (S.D.N.Y. 1979). *See generally Lewis* v. *Graves*, 701 F.2d 245, 248-49 (2d Cir. 1983), and cases cited therein. As the First Circuit aptly remarked, "It does not follow . . . that a director who merely made an erroneous business judgment in connection with what was plainly a corporate act will 'refuse to do [his] duty on behalf on [sic] the corporation if [he] were asked to do so.' Indeed, to excuse demand in these circumstances — majority of the board approval of an allegedly injurious corporate act — would lead to serious dilution of Rule 23.1." *In re Kauffman Mutual Funds, Inc.*, 479 F.2d at 265 (citation omitted).

(Pet. App. 53a-54a.)

In sum, the district court found that plaintiff's two conclusory allegations, unsupported by any specific facts, were factually insufficient to excuse plaintiff's failure to make a demand on the Fund's Board of Directors before she filed suit.[3] Based on plaintiff's factual allegations, it was therefore

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[3] The reasons for requiring a demand on the Board of Directors before allowing a shareholder to initiate suit apply with special force to actions under the Investment Company Act of 1940, which mandates disinterested directors. *See* 15 U.S.C. § 80a-10. In light of tne mandated independence for these decisionmakers, a court should submit an assertion of futility to more exacting scrutiny. Here, the district court specifically found that the Board was capable of considering a demand, and there is no reason to disturb that finding. (Pet. App. 56a.)

clear that plaintiff could not rely on the futility exception in this case, whatever the availability of that exception might be in the abstract. For that reason, even if the Seventh Circuit's reasoning in this case should be deemed to conflict with the holdings of other cases, that conflict would be purely academic. There is no reason for this Court to accept for review an issue that cannot conceivably affect the outcome. Even assuming that the Court could properly grant certiorari for the purpose of reviewing the reasoning of the Seventh Circuit in this case, prudential considerations argue strongly to the contrary.[4]

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[4] Plaintiff's assertion (Pet. 8-10) that this Court should apply Maryland law to decide whether she has properly pled demand and futility is incorrect. Although the law of the state of incorporation may govern the substantive requirements of demand and futility when the claim for relief is based on state law, *see, e.g., Burks* v. *Lasker*, 441 U.S. 471, 475-77 (1979), and *Starrels* v. *First Nat'l Bank*, 870 F.2d 1168 (7th Cir. 1989), federal law governs the requirements of demand and futility when a claim for relief is based on federal substantive law, as in the case at bar. *See Burks*, 441 U.S. at 475-77; *see also Nussbacher* v. *Continental Ill. Nat'l Bank & Trust Co.*, 518 F.2d 873 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976); *Thornton* v. *Evans, 692 F.2d 1064 (7th Cir. 1982).*

Moreover, the cases cited by plaintiff (Pet. 9-10 n. 3), even if controlling, would not dictate a result different from that reached by both courts below. For example, in *Parish* v. *Maryland & Va. Milk Producers Ass'n*, 250 Md. 24, 242 A.2d 512 (1968), *cert. denied*, 404 U.S. 940 (1971), which plaintiff characterizes as the leading Maryland case on point, the complaint alleged causes of action for "fraud, concealment, illegality, gross negligence, waste of corporate assets and conspiracy to conceal losses" against the directors of the corporation individually and a majority of the directors were interested. In contrast, plaintiff has not sued any director individually for any action and concedes that only three of the ten directors could be said to be interested.

B. The Seventh Circuit's Decision Does Not Directly Conflict With The Decision Of Any Other Court Of Appeals.

The petition should be denied for the additional reason that plaintiff's proffered conflict, while probably illusory, is certainly incipient at best, and does not constitute the kind of considered and settled conflict that commands the attention and scarce resources of this Court. As we have noted (*see* page 4, *supra*), the Seventh Circuit did not disagree with the district court's finding that plaintiff had simply failed to meet the factual preconditions necessary for establishing a valid excuse under the futility exception. Rather, it reached beyond that finding to assert that futility should no longer be recognized as a valid exception to the demand requirement. Other courts have shown impatience with the futility exception and have given it a narrow reading, denying its application even where the facts clearly show that the directors will not authorize the filing of suit. *See, e.g., Lewis* v. *Graves*, 701 F.2d 245 (2d Cir. 1983); *Greenspun* v. *Del E. Webb Corp.*, 634 F.2d 1204 (9th Cir. 1980); *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 263 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973) ("to be allowed, *sua sponte*, to place himself in charge without first affording the directors the opportunity to occupy their normal status, a stockholder must show that his case is exceptional").

Nonetheless, the treatment of the issue by the court below is unique in that other courts have not heretofore considered the possibility that the futility exception no longer should be recognized. Those courts simply have assumed that the futility exception continues to exist and therefore have proceeded to apply the exception to the relevant facts, frequently finding that the exception should not be applied in the particular case. Thus, none of plaintiff's purportedly conflicting cases actually speaks to the issue raised by the Seventh Circuit; and those decisions cannot therefore be said to conflict with the decision below. What these cases show, including the decision below, is that federal common law pertaining

to the futility exception is evolving, but it is nonetheless clear that no conflict warranting review exists at this time.

Whatever the future may hold for the futility exception, this Court certainly will benefit from further consideration by the lower federal courts. As the decision below demonstrates, that process of discussion has only begun, and it would be premature at this time for this Court to terminate it. *See, e.g.*, *McCray* v. *New York*, 461 U.S. 961, 962-63 (1983) (Stevens, J.). *See also* Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982) ("[E]xperience with conflicting interpretations of federal [law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result."); Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983) ("there is already in place . . . a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question").

At present, there is no conflict among the circuits because no other court of appeals has either accepted or rejected the new approach advanced by the Seventh Circuit in this case. Unless and until the decisions of the courts of appeals have developed into a pattern of settled conflict, this Court should neither preempt discussion of this issue by the lower federal courts nor devote its own scarce resources to deciding this issue. It may be that some other courts will embrace the Seventh Circuit's reasoning, while others will not. In that event, review by this Court may well become necessary. On the other hand, other courts may uniformly reject the Seventh Circuit's reasoning, and even the Seventh Circuit may then reconsider its position. In that event, this Court may never need to act. Thus, before devoting its resources to this issue, this Court should wait and see whether a direct and substantial conflict does indeed develop.

C. The Seventh Circuit's Decision Does Not Conflict With Any Prior Holding Of This Court.

To support her assertion that the decision below conflicts with prior decisions of this Court, plaintiff principally relies on three cases, the most recent of which was decided more than 80 years ago. *See Hawes* v. *Oakland*, 104 U.S. 450 (1881); *Doctor* v. *Harrington*, 196 U.S. 579 (1905); *Delaware & Hudson Co.* v. *Albany & Susquehanna R.R.*, 213 U.S. 435 (1909). These decisions, however, do not support the conflict which plaintiff asserts to exist here.

First, the Seventh Circuit found that none of these cases is good law. (Pet. App. 18a-19a.) The issue in *Doctor* was whether a corporation should be aligned as a plaintiff or a defendant for purposes of diversity jurisdiction. As the Seventh Circuit noted, *Doctor* held that the corporation should be aligned as a defendant when the board is so hostile to the investors that demand would be futile, but that the corporation should otherwise be aligned as a plaintiff. This holding was overruled in *Smith* v. *Sperling*, 354 U.S. 91 (1957), which held that a corporation should always be aligned as a defendant for purposes of diversity, regardless of whether a demand would be futile. Thus, *Doctor* is not controlling. *Susquehanna*, which merely followed *Doctor*, also lacks precedential value.[5]

Second, each of these cases was decided prior to the adoption of Rule 23.1, the rule at issue here. *Doctor* and *Susquehanna* were decided under old Equity Rule 94 which, as the Seventh Circuit noted, "is no longer with us, having been amended many times in the course of its transformation to Rule 23.1." (Pet. App. at 19a.) *Hawes* was decided prior to

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[5] Petitioner also cites *Sperling* as approving the futility exception. However, *Sperling* does not discuss the futility exception. In its recitation of the facts, the *Sperling* Court noted the district court finding that a demand on the board would have been to no avail. However, this Court did not indicate that that finding had any significance to the result. *See Sperling*, 354 U.S. at 96.

the adoption of Equity Rule 94, and actually led to the adoption of that rule. Thus, the holdings of these cases are tied to the now-defunct equity rules and cannot be assumed to govern cases under Rule 23.1.

Third, all of plaintiff's cases were decided prior to the enactment of the Investment Company Act of 1940 under which plaintiff sues. The Act specifically established procedural safeguards which require that a contract to provide investment advisory services must be approved by a majority of disinterested directors. *See* 15 U.S.C. § 80a-15(c). Furthermore, the Act established stringent standards as to when a director may be characterized as an "interested person." *See* 15 U.S.C. § 80a-2(19). With these statutory safeguards in place, demand should be required so that the directors can make the initial determination on filing suit and provide the court with a basis for determining if their action went beyond the range of reasonable business judgment if they refuse to file suit. At the time *Hawes*, *Doctor* and *Susquehanna* were decided, no such safeguards existed to protect mutual fund shareholders from interested director transactions. The holdings of these cases are not controlling for a cause of action under the 1940 Act, which was enacted after those cases were decided, which contains substantially different rules of corporate governance, and which specificially imposes standards of director independence and responsibility.

Finally, there has been a dramatic change in the decision-making procedures of corporate boards of directors, and thus the assumptions upon which this Court relied in *Hawes*, *Doctor* and *Susquehanna* are no longer valid. At the turn of the century, when those cases were decided, boards of directors normally did not decide matters relating to interested directors through committees of disinterested directors.[6] In sum, this Court has never endorsed a futility exception to the

[6] Plaintiff's citation to two articles published between twenty and thirty years after the *Doctor* decision (*see* Pet. 7), does not undercut this argument.

demand requirement of Rule 23.1 under the procedures currently used by corporations to ensure disinterested decision-making.

The only modern authority cited by plaintiff is *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523 (1984), but that decision is fully consistent with the decision in this case. In *Fox*, the shareholder was not required to make a demand prior to proceeding under Section 36(b) because a Section 36(b) suit cannot be initiated by a corporation. Such suits may be brought only by a shareholder or by the SEC. Since the directors have no power to bring suit on behalf of the corporation, there is no purpose to be served by requiring a demand under Section 36(b). That analysis does not apply to a Section 20(a) claim, which the directors could initiate if they deemed it to have merit.

II. THE SEVENTH CIRCUIT'S HOLDING, THAT PLAINTIFF HAS NO RIGHT TO A JURY TRIAL UNDER SECTION 36(b), IS CORRECT AND DOES NOT CONFLICT WITH ANY PRIOR HOLDING OF THIS OR ANY OTHER COURT.

The Seventh Circuit's holding, that plaintiff is not entitled to a jury trial under Section 36(b), is consistent with the decisions of every court that has considered the issue. Indeed, the lower federal courts have displayed rare unanimity in ruling that no jury trial right exists under Section 36(b) because it creates only equitable rights, and this Court repeatedly has denied further review. *See Krinsk* v. *Fund Asset Management, Inc.*, 875 F.2d 404, 414 (2d Cir.), *cert. denied*, 110 S. Ct. 281 (1989); *Schuyt* v. *Rowe Price Prime Reserve Fund, Inc.*, 835 F.2d 45, 46 (2d Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988); *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 487 F. Supp. 999, 1008 (S.D.N.Y.), *mandamus denied sub nom. In re Gartenberg*, 636 F.2d 16 (2d Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *In re Evangelist*, 760 F.2d 27, 30-31 (1st Cir. 1985); *Tarlov* v. *Paine Webber Cashfund, Inc.*, 559 F. Supp. 429, 441 (D. Conn. 1983); *Jerozal* v. *Cash Reserve Management, Inc.*, [1982-1983 Transfer Binder] Fed.

Sec. L. Rep. (CCH) ¶ 99,019, at 94,827 (S.D.N.Y. Aug. 10, 1982); *Markowitz* v. *Brody*, 90 F.R.D. 542, 547-48 (S.D.N.Y. 1981); *Weissman* v. *Alliance Capital Management Corp.*, 3 Fed. R. Serv. 3d (Callaghan) 1380, 1382-84 (S.D.N.Y. Nov. 27, 1985), *mandamus denied sub. nom. In re Weissman*, 788 F.2d 5 (2d Cir. 1986).

In each of the foregoing cases, the lower federal courts exhaustively considered the language and legislative history of Section 36(b) and properly concluded that Section 36(b) actions are equitable in nature. That conclusion is correct, and no further review is warranted.

Plaintiff nonetheless suggests (Pet. 13-16) that this case warrants review on the ground that a different analysis is required under this Court's recent decision in *Teamsters, Local No. 391* v. *Terry*, 110 S. Ct. 1339 (1990). That is not the case, however, because the Seventh Circuit expressly applied the *Terry* test and concluded that the same result obtained.

In *Terry*, this Court employed a two-prong constitutional test for determining whether a cause of action involves equitable rights not subject to the Seventh Amendment jury requirement. That two-step analysis requires a court to examine (1) whether historically the action was equitable or legal in nature, and (2) whether the actual remedy sought by the plaintiff is for equitable relief or money damages. *Id.* at 1345. The Seventh Circuit expressly applied these standards to plaintiff's claim under Section 36(b), found it to be an equitable action, and affirmed the striking of the jury demand.

Although Section 36(b) did not exist when the distinction between law and equity was abolished in 1938, the Section 36(b) action is one for breach of fiduciary duty, which the *Terry* Court recognized as an eighteenth century equitable action. 110 S. Ct. at 1345. Thus, the first prong of the *Terry* test shows that Section 36(b) actions do not call for a jury trial. The second prong of the *Terry* test leads to the same conclusion. The remedy sought in a Section 36(b) action is a

return to the Fund of excessive fees — essentially an action for restitution, which is an equitable remedy. As the Seventh Circuit noted in the case at bar, "the [Section 36(b)] statute creates a fiduciary duty and enforces it with a remedy (disgorgement) common in trust cases." (Pet. App. 31a.) Thus, both prongs of this Court's two-step analysis demonstrate that plaintiff has no right to a jury trial.

Notwithstanding this clear precedent, plaintiff argues that she is entitled to a jury trial merely because the word "damages" appears in Section 36(b)(3). (Pet. 14.) As the district court pointedly observed, "[t]his argument has been rejected by every court that has considered it." (Pet. App. 58a, n. 19.) Moreover, because the legislative history repeatedly states that Section 36(b) actions are equitable, it is "impossible to conclude from the use of the word 'damages' that Congress thereby provided for a trial by jury." *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 487 F. Supp. at 1006.

In sum, plaintiff's assertion that she is entitled to a jury trial is contrary to all relevent authority and warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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